Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ALICE R. LANE, Conservator of the Estate of Elizabeth G. Jamerson, Conservatee,

Petitioner,

vs.

LANDELS, RIPLEY & DIAMOND, a general partnership by and through its partners, GREGORY D. GERMAINE and DOES 1 through 100, inclusive,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether The Supreme Court of the State of California Violated Petitioner's Right To Due Process Of Law When It Let Stand A Superior Court Order Denying The Substitution of Retained Counsel for Petitioner, When Petitioner Had Filed A Complaint *In Propria Persona*, In Her Capacity As Conservator, For The Sole Purpose Of Preserving A Cause Of Action Against Respondents, Former Attorneys For The Estate, For Wasting Assets.

PARTIES TO THE PROCEEDING

The parties to this proceeding are ALICE R. LANE, Conservator of the Estate of Elizabeth G. Jamerson, Conservatee, and LANDELS, RIPLEY & DIAMOND, a general partnership by and through its partners, GREGORY D. GERMAINE and DOES 1 through 100, inclusive.

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The unreported decision of the California Superior Court, City and County of San Francisco, granting defendant's motion for judgment on the pleadings without leave to amend, filed July 6, 1994, appears as Appendix A. The unreported decision of the California Court of Appeals, First Appellate District, Division Three, filed February 28, 1996, affirming the judgment of the trial court, appears as Appendix B. The unreported opinion of California Court of Appeals, First Appellate District, Division Three, filed March 18, 1996, denying Respondent's Petition for Rehearing, appears as Appendix C. The unreported opinion of the California Supreme Court, filed May 27, 1996, denying Petitioner's Petition for Review, appears as Appendix D.

JURISDICTION

The jurisdiction of the Court is invoked under Rule 13 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISION

The Fifth and Fourteenth Amendments provide in pertinent part: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . "

STATUTORY PROVISIONS

California Probate Code §2401:

> "(a) The Guardian or conservator, . . . has the management and control of the estate and, . . . shall use ordinary care and diligence. What constitutes ordinary care and diligence is determined by all the circumstances of the particular estate."

California Probate Code §2462:

> "[T]he guardian or conservator may:
>
> (a) Commence and maintain actions and proceedings for the benefit of the ward or conservatee or the estate."

California Probate Code §2590:

> "The court may, in its discretion make an order granting the guardian or conservator any one or more of all the powers specified in Section 2591 if the court determines that, under the circumstances of the particular guardianship or conservatorship, it would be to the advantage, benefit and best interest of the estate to do so."

INTRODUCTION

The California Supreme Court violated Petitioner's due process rights by upholding a superior court order which disallowed Petitioner's *pro per* complaint, filed for the sole purpose of preserving a cause of action against Respondents before the Statute of Limitations ran out, on the grounds that she was not a licensed attorney, and consequently, could not file an action on behalf of the

estate, thereby preventing her from fulfilling one of the primary purposes of her trust, namely to preserve the assets of the estate.

As a result, Respondents, the former attorneys for the estate, who had failed to protect the Estate's interest in property, thereby losing a valuable property belonging to it, are not held accountable for their wasting of the assets of the estate. This was in direct violation of Petitioner's substantive due process rights, in that property of the estate was "taken" or lost by Respondents' actions, and in direct violation of Petitioner's procedural due process rights, in that she was denied access to the courts when the superior court denied her leave to allow the substitution of retained counsel to represent the estate in a malpractice action against Respondents.

STATEMENT OF FACTS

On or about August 12, 1991, Petitioner-Conservator, obtained a judgment of recission against a married couple, the Bakers. This judgment called for a return of property previously owned by Conservatee and sold to the Bakers to the Conservatorship. Petitioner subsequently learned that Baker had filed for bankruptcy and listed the property among its assets.

On or about February 5, 1992, Respondents, a high profile law firm, were retained to represent the Conservatee, Elizabeth G. Jamerson, who is incompetent, to protect the Estate of the Conservatee (hereinafter Estate)

as a potential creditor in the Baker bankruptcy proceeding. In so doing, they promised to competently represent and safeguard the assets and interests of the Estate.

Thereafter, Respondents failed to notify the Trustee and bankruptcy court that the property was not part of Baker's assets, nor take any other measures to protect the Estate's interests in the property. The property was subsequently sold in a foreclosure sale to a bona fide purchaser for value. Because of Respondent's malfeasance, the property was lost to the Estate.

Petitioner then diligently sought to find an attorney to represent the Estate in a malpractice action against Respondents. When she was unsuccessful in her attempts to retain counsel, and with the impending expiration of the Statute of Limitations looming on the horizon, Petitioner filed a malpractice claim against Respondents in propria persona solely to preserve the cause of action for the Estate.

Petitioner did not immediately serve the complaint because she was still looking for counsel to represent the Estate. However, Respondents learned of the action by reading the public notice published in the local legal newspaper, and filed an answer on May 4, 1994. A scant three weeks later, Respondents filed a motion for judgment on the pleadings citing for their reason that Petitioner was not an attorney and was therefore unable to file an action on behalf of the Estate.

A hearing on the motion was first set for June 9, 1994. On June 1 Petitioner requested a continuance in order to have additional time to obtain counsel to represent the

Estate. The motion was granted to July 6 with the admonition that no further continuance would be granted for any reason.

On July 6 Petitioner appeared with attorney, Edward Puttre, who advised the court that he had been retained by Petitioner the previous day, and he would be willing to represent the Estate subject to approval by the Probate Court. Although all parties believed that such pre-approval was necessary, in fact, it was not.

The trial court then accepted Respondent's argument that Petitioner could not represent the Estate because she was not an attorney, and granted the motion for judgment on the pleadings without leave to amend. This appeal followed.

REASONS FOR GRANTING WRIT

THE SUPREME COURT OF THE STATE OF CALIFORNIA VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW AS PROVIDED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION, WHEN IT LET STAND A SUPERIOR COURT ORDER DENYING THE SUBSTITUTION OF RETAINED COUNSEL FOR PETITIONER, WHEN PETITIONER HAD FILED A COMPLAINT *IN PROPRIA PERSONA* IN HER CAPACITY AS CONSERVATOR, FOR THE SOLE PURPOSE OF PRESERVING A CAUSE OF ACTION AGAINST RESPONDENTS, FORMER ATTORNEYS OF THE ESTATE, FOR WASTING ASSETS.

It is clearly binding precedent in the State of California that a court may not give a conservator or guardian

an order that would prevent that conservator or guardian from fulfilling one of the primary purposes of his or her trust. (*In re Estate of Reynolds*, 60 Cal.App.2d 669 (1943)). When the Superior Court of the State of California, City and County of San Francisco, disallowed the substitution of retained counsel for Petitioner in her *pro per* complaint, it put Petitioner in an untenable situation. Namely, it denied to Petitioner, who owed a statutory, fiduciary duty, pursuant to the California Probate Code §2401, and to exercise that duty with the highest degree of faith and confidence (*Guardianship of Carlan*, 43 Cal.App.2d 204 (1941)), the course which would best serve the interests of the conservatee and her estate. (*In re Guardianship of Boyes*, 151 Cal. 143 (1907).)

Although Petitioner must perform her duties under judicial supervision and control (*In re Gandolfo*, 3 Cal.3d 889 (1984)), the court must exercise its supervisory powers with the utmost discretion and not arbitrarily or capriciously. (*Guardianship of Howard*, 218 Cal. 607 (1933).)

When Petitioner realized that Respondents had failed in their duty to preserve assets belonging to the Estate, she realized that her immediate duty was to discharge Respondents and hold them liable for wasting assets. Because she could not find substitute counsel, she filed a complaint *in propria persona*, on behalf of the estate, so that it would not be lost by the running of the Statute of Limitations. A very short time later, counsel was retained and was ready, willing, and able to substitute in for Petitioner as attorney of record in the case.

But the Superior Court, *and* the California Court of Appeals *and* the California Supreme Court, in misguided

reliance on one of the few cases in this area, *City of Downy v. Johnson*, 263 Cal.App.2d 775 (1968), decided that plaintiff was "practicing law without a license" and that permitting the complaint to stand, or counsel to be substituted in via amendment, would bring about "harmful consequences . . . where confusion . . . (would reign) . . . supreme because of the many unintelligible, untimely and inappropriate documents (the *pro per* complaint) (may prepare) not to mention the consequent serious prejudice to the substantial rights (of the Estate of the Conservatee.)" *Id.*, at 779.

But the instant case differs vastly from *Downey*, where the conservator filed numerous motions, conducted a trial, and then appealed when he lost the case. Additionally, in *Downey*, although all of the conservator's actions were stricken, the notice of appeal was left intact so that the entire cause of action was not, as here, lost forever. Another significant difference is that here Petitioner was a fiduciary performing a duty for the extremely limited purpose of preserving a cause of action on behalf of the Estate. In each case cited as a progeny of *Downey*, where the case was not permitted to proceed, the *pro se* complainant was pursuing personal, economic gain, not fulfilling a high fiduciary duty.

Again, in *Alexander v. Robertson*, 882 F.2d 421 (9th Cir. 1989) a vessel broker and surety were being sued for deficiency following the seller's repossession and resale of a vessel where the broker's agent had misappropriate funds, and the co-defendant's counsel was not licensed.

This was not the case here. Petitioner appeared at the hearing for judgment on the pleadings motion with retained counsel. The attorney could easily have substituted himself in with an amendment. It is interesting to note too, that the trial court also refused to allow a continuance to allow the Probate Court to approve the retention of Puttre as they had allowed one previous continuance so that Petitioner could obtain counsel. The policy of great liberality in permitting amendments at any stage of the proceeding was declared at an early date and has been repeatedly followed in the State of California. *Frost v. Whittier*, 132 Cal. 421, 424 (1901); *Kirby v. Albert D. Seeno Construction Co.*, 11 Cal.App.4th 1069, 1070 (1992). The harm the Superior Court sought to prevent by essentially punishing Petitioner for "practicing law" led to an even greater harm, namely, that Respondents were not held accountable for their negligent and careless wasting of assets.

Two public policies underlie the strictures against the unlicensed practice of law. First, attorneys must be licensed so that the public is protected from being advised and represented by persons who are not qualified to practice law. (*Rogers v. Municipal Court*, 197 Cal.App.3d 1314, 1319 (1988); *Russell v. Dopp*, 16 Cal.App.4th 765 (1995).) Second, the litigation of cases by the unlicensed attorneys threatens the integrity of the judicial process itself. (*Russell v. Dopp, supra*, citing *Alexander v. Robertson, supra*, at 423-425.) Neither of these harmful consequences was present here. In fact, here, public policy would have *been served* by allowing counsel, who was ready to do so, to substitute in and pursue the malpractice action against Respondents.

The Estate was not prejudiced by the lack of legal education of the Petitioner, because she was, on the contrary, protecting the estate in the only way open to her. No confusion arose because of unintelligible, untimely or inappropriate documents, because Petitioner never intended to proceed with the case on her own.

When the lower courts relied on the theory that Petitioner was practicing law without a license and that public policy could not permit this or harmful consequences might result, it engaged in a verbal sleight-of-hand which nevertheless cannot hide the fact that Petitioner was not permitted to perform her highest duty by an order of the court, in direct contravention to statutory and case law. If allowed to stand on what is essentially a procedural technicality, this will create an ethical dilemma for well-meaning Conservators who are only trying to do their best to fulfill their primary duty. It creates an anomaly to conclude that it is in the general interest of the Estate to have an attorney, but then apply the rule to penalize the Estate because the complaint was filed without an attorney. (*Rogers v. Municipal Court, supra.*)

Petitioner is not asking to perform the duties of an attorney, just that this Court declares that her filing the complaint for the sole purpose of preserving the action for the Estate, is a technical defect which the statutes and rules were designed to accommodate.

It is simply unfair to put Petitioner and other conservators in a position to make a choice that is no choice: to be in a position where, whether they act or not, they are condemned.

The course of action in the best interests of the Conservatee was to preserve the cause of action against Respondents for their egregious mishandling of the property sale. Petitioner could only take that best course of action by filing the complaint. She should be permitted to amend the complaint and substitute a court-approved retained attorney for herself to continue the case.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment of the California Supreme Court.

Respectfully submitted,

KJELL C. BOMARK-NOEL
Counsel of Record

APPENDIX A

SUPERIOR COURT OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
No. 959608

ALICE R. LANE, Conservator of
the Estate of Elizabeth G. Jamerson,
Conservatee,

Plaintiff

v.

LANDELS, RIPLEY & DIAMOND
a general partnership by and through
its partners, GREGORY L. GERMAIN,
and DOES 1 through 100, inclusive,

Defendants

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

Filed: July 6, 1994 (Alan Carlson, Clerk)

Defendant Landels, Ripley and Diamond's motion for judgment on the pleadings came on for hearing on July 6, 1994.

This Court, having read and considered Landels, Ripley and Diamond's motion for judgment on the pleadings and the papers filed in support of and opposition to the motion, and for apparent good cause, issues and makes the following:

ORDER:

Defendant Landels, Ripley and Diamond's motion for judgment on the pleadings is *granted without leave to amend.*

Dated: 7/6/94

signed [William Cahill]
Judge, Superior Court

APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE
No. AO67203

(San Francisco County Superior Court No. 959608)

ALICE R. LANE, As Conservator, Etc.,

Plaintiff and Appellant

v.

LANDELS, RIPLEY & DIAMOND et al.,

Defendants and Respondent

Filed: February 28, 1996, Ron D. Barrow, Clerk
Affirming The Judgment of the Trial Court.

Alice R. Lane, as conservator of the estate of Elizabeth G. Jamerson (Lane), appeals from a judgment on the pleadings entered in favor of respondents Landels, Ripley & Diamond, and Gregory L. Germain (collectively Landels). We affirm.

FACTS

On March 24, 1994, Lane filed a complaint against Landels on behalf of her mother's estate, alleging causes of action for legal malpractice, breach of fiduciary duty, and breach of contract. Lane was assisted by counsel in

drafting the complaint, but had not retained counsel to represent the estate. She filed the complaint in propria persona, in an attempt to prevent the estate's claims from being barred by statute of limitations. She believed the statute might expire as soon as March 30, 1994. Lane did not serve the complaint; she intended not to proceed further until she could obtain counsel. Based on her experience in the conservatorship proceedings, Lane believed the probate court judge wanted to approve in advance any conservatorship work done by attorneys. The order appointing Lane as conservator did require Lane to obtain court approval before employing counsel.[1]

Landels learned from a notice published in a legal newspaper that the complaint had been filed. On May 4, 1994, they filed an answer, alleging among other defenses that Lane lacked capacity to bring the action and had not obtained authority from the probate court to pursue the lawsuit. On May 25, 1994, Landels filed a motion for judgment on the pleadings, on the ground that Lane could not appear in propria persona on the conservatee's behalf. The motion was noticed for hearing on June 9. Lane asked an attorney, Christopher Witteman, to seek a stipulation for a continuance from Landels so Lane could obtain counsel before the hearing on the motion. Witteman faxed a letter to Landels requesting a continuance, but Landels refused, stating the motion was dispositive of the case because the complaint was improperly filed, and therefore there was no reason for a postponement. Witteman then fortified Landels that Lane would move ex

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[1] Under Evidence Code section 452, subdivision (d), we take judicial notice of the order appointing Lane as conservator.

parte for a continuance. On June 1, the trial court granted Lane a continuance until July 6, but stated in its order no further continuance would be permitted for any reason.

Lane filed her opposition to the motion for judgment on the pleadings on June 28, 1994 still acting in propria persona. She argued she did not lack capacity to sue, and explained she had filed the complaint in propria persona in order to protect the estate's claims against the running of the statute of limitations. She requested that if the court granted the motion, it also grant her leave to amend her pleadings to show she was represented by counsel. She stated she hoped to be able to tell the court at the hearing that she had retained counsel and was prepared to go forward with the litigation.

At the hearing on July 6, attorney Edward Puttre "specially appeared" for Lane, who was also present. Although the transcript of the hearing is not included in the record on appeal,[2] Lane points out the nature of Mr.

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[2] The transcript is not part of the record because Lane failed to designate it as part of the record, to seek augmentation of the record in a timely fashion, or to show good cause for belated augmentation. (See First Appellate District Local Rule 6(b) [requests for augmentation should be filed in one motion within 30 days after record is filed, and thereafter "will only be entailed upon a showing of good cause"]; *People v. Presley* (1977) 70 Cal.App.3d 486, 492 [disapproving delays in requests for augmentation]; *People v. Hagan* (1962) 203 Cal.App.2d 34, 39 [despite policy of liberality in granting augmentation, some showing of good cause is required, particularly in cases of protracted delay].) Lane's opening brief improperly referred to the reporter's transcript, and Landels moved to strike the brief on that ground. We denied the motion to strike, stating that we would disregard the defects in the brief and ignore matters that

Puttre's appearance is explained in a declaration filed by respondent Germain in the trial court. "Mr Puttre stated he had been asked by Lane the day before the hearing to make a special appearance, he did not have probate court approval to represent Lane, but he would be willing to represent her subject to probate court approval. Mr Puttre requested a further continuance so he could seek Probate Court approval for this employment."

The trial court granted the motion for judgment on the pleadings without leave to amend, and on July 15, 1994, entered judgment on the pleadings without leave to amend, and on July 15, 1994, entered judgment for Landels. On July 18, Lane filed a request for rehearing, still acting in propria persona. She scheduled a hearing for August 12, still without notice to Landels, Lane postponed the hearing to September 29. On August 16, Landels first learned of the request for rehearing when they called the trial court in response to a notice of status conference. Landels moved to strike the request for rehearing on the grounds that (1) Lane could not file pleadings on behalf of the conservatorship in propria persona; (2) the request was incoherent and did not set forth any new facts, circumstances, or law as required by Code of Civil Procedure section 1008, subdivision (a)[3];

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were not presented by the record on appeal. (See California Rules of Court, rule 18 [reviewing court may either order defective brief returned to counsel for correction, strike the brief, or disregard its defects]; *Matuz v. Gerardin Corp.* (1989) 207 Cal.App.3d 203, 206-207 [denying motion to strike and disregarding improper matter in brief].)

[3] Further statutory references are to the Code of Civil Procedure, unless otherwise specified.

and (3) Lane had improperly delayed serving the request and scheduling a hearing. The court granted Landels' motion to strike on August 30, 1994.

On September 6, 1994, Lane filed a substitution of attorney naming Kjell C. Bomark-Noel as attorney of record in place of herself. On September 7, Bomark-Noel filed a notice of appeal and represents Lane in this court.

DISCUSSION

A conservator who is not a licensed attorney cannot appear in propria persona in his or her representative capacity outside of the conservatorship proceedings in probate court. (*City of Downey v. Johnson* (1968) 263 Cal.App.2d 775, 780 (*Downey*).) Similarly, a corporate officer who is not an attorney cannot appear in propria persona on behalf of the corporation (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 731; *Rogers v. Municipal Court* (1988) 197 Cal.App.3d 1314, 1318); a nonattorney guardian ad litem cannot appear for a minor in propria persona (*J.W. v. Superior Court* (1993) 17 Cal.App.4th 958, 967-968); and an attorney in fact under a power of attorney cannot appear in propria persona on behalf of the principal (*Drake v. Superior Court* (1994) 21 Cal.App.4th 1824, 1830-1831).

Legal representation by nonattorneys is prohibited by statute; only active members of the State Bar may represent parties to an action. (Bus. & Prof. Code, §6125; *Drake v. Superior Court, supra,* 21 Cal.App.4th at p. 1830; *J.W. v. Superior Court, supra,* 17 Cal.App.4th at pp. 965, 968; Downey, supra, 263 Cal.App.2d at p. 783.) Furthermore, sound judicial policy requires persons engaging in

the practice of law to meet minimum standards: (*Merco Constr. Engineers, Inc. v. Municipal Court, supra,* 21 Cal.3d at p. 731; see also *Russell v. Dopp* (1995) 36 Cal.App.4th 765, 773 [two public policies underlie strictures against unlicensed practice of law-protection of public from advice and representation by unqualified persons, and protection of integrity of judicial process].) Pleadings filed by a nonattorney purporting to represent another party in propria persona are properly stricken. (*Drake v. Superior Court, supra,* 21 Cal.App.4th at pp. 1829-1830 [document entitled "amicus curiae" brief filed by attorney in fact in propria persona was properly stricken by trial court]; *Downey, supra,* 263 Cal.App.2d at pp. 782-783 [pleadings filed by conservator in propria persona in appellate court were stricken, except for notice of appeal]; *Himmel v. City Council* (1959) 169 Cal.App.2d 97, 100-101 [complaint filed by corporate officer in propria persona on corporation's behalf was properly stricken].)

Landels moved for judgment on the pleadings based on the rule against representation by a conservator in propria persona, which was established in *Downey.* The relevant facts are not in conflict, so application of the *Downey* rule represents an issue of law, which we review de novo. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888; *Pennsylvania Health & Life Ins. Guaranty Assn. v. Superior Court* (1994) 22 Cal.App.4th 477, 480.) With respect to a ruling on the pleadings, we review the result and not the trial court's reasons, and will uphold the ruling if it is correct on any theory. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519, fn. 12.) the trial court abuses its

discretion in granting judgment on the pleadings without leave to amend unless the pleading shows on its face that it is incapable of amendment. (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 876-877; *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1852.) We find no abuse of discretion here. Lane's improper in propria persona filing was a fundamental defect that was apparent on the face of the complaint, and that could not have been remedied by an amended pleading.

Lane's attempt to represent the conservatee as plaintiff in propria persona was insufficient to vest the trial court with personal jurisdiction over the conservatee. It is well established that if the only basis for jurisdiction over a defendant is appearance, a purported appearance by an unauthorized attorney cannot confer jurisdiction and any judgment rendered by the trial court against the defendant is void. (*Zirbes v. Stratton* (1986) 187 Cal.App.3d 1407, 1414; *Slack v. Slack* (1966) 241 Cal.App.2d 530, 538; 2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, § 145, pp. 529-530.) We have found no California authority pertaining to unauthorized appearance on behalf of an incompetent plaintiff, but it is clear that an analogous rule must apply. Ordinarily, by filing an action the plaintiff submits to the jurisdiction of the court for purposes of that action. (*In re Marriage of Aron* (1990) 224 Cal.App.3d 1086, 10995; *Maloney v. Maloney* (1944) 67 Cal.App.2d 278, 280; 2 Witkin, Cal. Procedure, *supra*, Jurisdiction, § 145, p. 491.) But an unauthorized filing can have no such effect, and a conservatee is incompetent to waive the procedural defect. (*Downey, supra*, 263 Cal.App.2d at p. 783 [conservatee was not competent to waive defects in procedure

resulting from in propria persona representation by conservator]; cf. Prob. Code, §§ 1872, subd. (A) [conservatee generally lacks legal capacity to make transactions binding on estate], 1870 ["transaction" includes "waiving a right"].)

Personal jurisdiction over the parties is a fundamental prerequisite for the exercise of judicial authority.[4] (§ 1917; *Macmillan Petroleum Corp. v. Griffin* (1950) 99 Cal.App.2d 523, 529, 532 [order obtained by defunct corporation to enforce judgment was void; [u]ntil a plaintiff with capacity to act appeared in the case, the court had no jurisdiction"]; 2 Witkin, Cal. Procedure, *supra*, Jurisdiction, § 80, p. 450.) Therefore, the trial court properly refused to allow Lane to proceed with her unauthorized action on behalf of the estate. In addition to the jurisdictional defect, Lane's representation was illegal and in violation of the public policies against practice by nonlawyers, which we have noted above. As the *Downey* court stated: "To give any effect to the judgment in this case would be a condonation of acts constituting both a crime and a possible contempt of court for we have a lay person not a member in good standing of any bar practicing law illegally, although perhaps unwittingly. We therefore feel constrained to hold the judgment invalid despite attendant loss of the effort and time of the trial courts and their attaches." (263 Cal.App.2d at p. 783, fn. omitted.)

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[4] Lack of jurisdiction over a party does not, of course, affect a court's jurisdiction to determine its own jurisdiction. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 302-303; *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1228.)

Here, of course, the defect was brought to the trial court's attention by Landels before the case proceeded to trial and judgment.[5] Lane argues the trial court should have permitted her to cure the defect. First, she contends the trial court should have allowed Mr. Puttre to substitute as the estate's counsel at the hearing on the motion for judgment on the pleadings. The problem with this claim is that no such substitution was attempted. The record shows Mr. Puttre, Lane, and Landels all understood and represented to the trial court that Lane had to obtain probate court approval before employing counsel. The probate court was authorized under Probate Code section 2590 to require Lane to obtain such approval, and the order appointing Lane as conservator establishes that the probate court did impose this condition. Mr. Puttre informed the trial court he was willing to substitute as counsel in the future, but he had not yet sought approval from the probate court.

Alternatively, Lane argues leave to amend should have been granted so she could amend the complaint to show she was represented by counsel. There are two

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[5] Lane's contention that Landels waived the defect or was estopped from raising it because they answered the complaint is meritless, since Landels raised the defect in the answer as an affirmative defense. The allegation that Lane lacked "capacity" to bring the action was not technically accurate, since as conservator Lane did have the capacity to commence an action for the benefit of the conservatee, by employing counsel for that purpose with court approval. (Prob. Code, §§ 2462, subd. (A), 2591, subd. (Q).) However, the allegation was sufficient to preserve the objection; the *Downey* court itself used the term "capacity" when discussing the conservator's lack of authority to file pleadings in propria persona. (263 Cal.App.2d at p. 781.)

problems with this position. In the first place, Lane was not in a position to make such a showing. Despite having been granted a continuance of over a month to obtain counsel, she appeared before the trial court in propria persona without the necessary probate court approval to employ counsel. In the second place, a complaint filed by a nonlawyer for another person is not a defect that can be corrected by filing an amended pleading. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (Rutter 1995) § 7:204.) What was required was a "consent of both client and attorney, filed with the clerk, or entered upon the minutes," together with written notice to the adverse parties (§ 284, subds. (1) & (2)). Merely removing the words "in pro per" from the face of the complaint, and adding counsel's name, address, and telephone number, as Lane argues she should have been permitted to do, would not have accomplished a substitution of attorneys. Therefore, the trial court did not abuse its discretion by denying leave to amend.

The judgment on the pleadings was not a determination on the merits, so principles of res judicata would not have precluded Lane from properly filing a complaint through counsel. (See *Koch v. Rodlin Enterprises* (1990) 223 Cal.App.3d 1591, 1595-1596; 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, §§ 217, 222, pp. 654-655, 659-660.) The record does not disclose whether Lane's fear that the statute of limitations may have run on the estate's cause of action was well-grounded. Nor does the record raise the question of whether Lane's in propria persona filing would have been sufficient against a statute of limitations defense if she had appeared before the trial court with the estate properly represented by counsel at the hearing on

the motion. We hold only that, in the circumstances presented to the trial court, the grant of judgment on the pleadings without leave to amend was proper.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

Parrilli, J.

We concur:

Chin, P.J.

Corrigan, J.

APPENDIX C

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE
No. AO67203

(San Francisco County Superior Court No. 959608)

ALICE R. LANE, As Conservator, Etc.,

Plaintiff and Appellant

v.

LANDELS, RIPLEY & DIAMOND et al.,

Defendants and Respondent

ORDER MODIFYING OPINION AND DENYING REHEARING (NO CHANGE IN JUDGMENT)

Filed: March 18, 1996, Ron D. Barrow, Clerk
Affirming The Judgment of the Trial Court.

BY THE COURT:

It is ordered that the opinion filed herein on February 28, 1996, be modified as follows:

At the bottom of page 1 and at the top of page 2, the text should read as follows: "The order appointing Lane as conservator did require Lane to obtain court approval to employ counsel." Footnote 1 remains.

At page 7, replace the sentence reading: "The probate court was authorized under Probate Code section 2590 to require Lane to obtain such approval, and the order appointing Lane as conservator established that the probate court did impose this condition." with the following: "The probate court was authorized under Probate Code section 2590 to require Lane to obtain court approval to employ counsel, and the order appointing Lane as conservator establishes that the probate court did impose this condition."

Appellant correctly notes the order appointing her as conservator did not expressly require prior court approval for her to employ counsel, and we have modified our opinion accordingly. However, this does not change the result. The order appointing appellant conservator was not a part of the record in appellant's malpractice action, and all parties represented to the trial court that prior approval was required. The record does not show that attorney Puttre was ready to represent appellant, but that he was willing to do so with the approval of the probate court, to be obtained after another continuance.

The petition for rehearing is denied. There is no change in judgment.

Dated: Mar 18, 1996 CORRIGAN, J. (Acting P.J).

APPENDIX D

First Appellate District, Division Three

No. AO67203/S052836
IN SUPREME COURT OF CALIFORNIA

(San Francisco County Superior Court No. 959608)

ALICE R. LANE, As Conservator, Etc.,

Appellant

v.

LANDELS, RIPLEY & DIAMOND

Respondent

ORDER MODIFYING OPINION AND DENYING REHEARING (NO CHANGE IN JUDGMENT)

Affirming The Judgment of the Trial Court.

Appellant's Petition for review *DENIED.*

Chin, J. did not participate.

[signed] George, Chief Justice

Supreme Court FILED May 29, 1996

Robert Wandruff, Clerk